



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 26, 2005

Ms. Betsy Hall Bender  
Attorney at Law  
P.O. Box 26715  
Austin, Texas 78755-0715

OR2005-00764

Dear Ms. Bender:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 217532.

The Schertz-Cibolo-Universal City Independent School District (the "district"), which you represent, received a request for bills received from (1) lawyers representing the district, for the current and past three fiscal years, and (2) consultants providing services to the district on behalf of a student accused of assaulting a named teacher and other faculty and staff members. You seek to withhold some of the requested information under sections 552.101 and 552.107 of the Government Code and Texas Rule of Evidence 503. You also inform us that some of the requested information is the subject of a prior open records letter ruling. We have considered your arguments and have reviewed the information you submitted.<sup>1</sup> We note that you have not submitted any information that consists of bills from consultants. We therefore assume that the district has released any information that is responsive to that aspect of this request, to the extent that such information existed when the district received this request. If not, then the district must release any such information at this time.<sup>2</sup> We note

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<sup>1</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

<sup>2</sup>See Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

that the Act does not require the district to release information that did not exist when it received this request or to create responsive information.<sup>3</sup>

Initially, we address your representation that some of the requested information is the subject of Open Records Letter No. 2004-2786 (2004). In that ruling, we concluded that the district could withhold certain information contained in attorney billing statements under Texas Rule of Evidence 503. You do not inform us that there has been any change in the law, facts, or circumstances on which the prior ruling is based. We therefore conclude that the district may continue to rely on Open Records Letter No. 2004-2786 (2004) with regard to any information that is responsive to the present request and that is encompassed by the prior ruling. See Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (attorney general decision constitutes first type of previous determination under Gov't Code § 552.301(a) when (1) precisely same records or information previously were submitted under Gov't Code § 552.301(e)(1)(D); (2) same governmental body previously requested and received ruling; (3) prior ruling concluded that same records or information are or are not excepted from disclosure; and (4) law, facts, and circumstances on which prior ruling was based have not changed).

Next, we note that the submitted information is subject to section 552.022 of the Government Code. This section provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Because the submitted information is contained in the district's bills for attorney's fees, the information must be released under section 552.022(a)(16) unless it is expressly confidential under other law. Section 552.107 of the Government Code is a discretionary exception to public disclosure that protects the governmental body's interests and may be waived. See Gov't Code § 552.007; Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally). As such, section 552.107 is not "other law" that makes information confidential for the purposes of section 552.022. Although you also raise section 552.101 in conjunction with the attorney-

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<sup>3</sup>See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

client privilege, this office has concluded that section 552.101 does not encompass discovery privileges.<sup>4</sup> *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Therefore, the district may not withhold any of the submitted information under section 552.107 or under section 552.101 on the basis of the attorney-client privilege.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence are “other law” within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is found at Texas Rule of Evidence 503. Therefore, we will address your assertion of the attorney-client privilege under rule 503.

Rule 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer’s representative;
- (C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication

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<sup>4</sup>Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101.

transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1993, no writ).

You contend that portions of the submitted attorney fee bills are protected by the attorney-client privilege under rule 503. You inform us that the information at issue relates to privileged communications between attorneys for and representatives of the district. You state that these communications were made for the purpose of facilitating the rendition of professional legal services. You also state that these communications were intended to be confidential, and you indicate that they remain confidential. Based on your representations and our review of the marked information that you claim is privileged, we find that you have demonstrated that some of the information at issue is confidential under rule 503. We therefore conclude that the district may withhold that information, which we have marked. We also find, however, that you have not identified each of the parties to the remaining communications at issue as being privileged parties under rule 503(b)(1). *See* Open Records Decision No. 676 at 8 (2002). Likewise, you have not shown that other information that you seek to withhold under rule 503 constitutes or documents an attorney-client communication. *See id.* at 7. We therefore conclude that the district may not withhold any of the remaining information that you claim is privileged under Rule 503.

Lastly, we address your claim under the federal Family Educational Rights and Privacy Act of 1974 (“FERPA”).<sup>5</sup> *See* 20 U.S.C. § 1232g. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student’s education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student’s parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Section 552.026 of the Government Code incorporates FERPA into the Act, providing that the Act “does not require the release of information contained in education records of an educational agency or institution, except in conformity with [FERPA].” Gov’t Code § 552.026; *see also* Open Records Decision No. 634 at 6-8 (1995).

Generally, FERPA requires that information be withheld from the public only to the extent “reasonable and necessary to avoid personally identifying a particular student.” *See* Open Records Decision Nos. 332 at 3 (1982), 206 at 2 (1978). You inform us that information

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<sup>5</sup>Section 552.101 encompasses information that other statutes, such as FERPA, make confidential.

contained in the submitted attorney fee bills identifies students of the district. To the extent that the information that you have highlighted consists of the names of students of the district, the district must not release such information unless it has authorization under FERPA to do so.

In summary: (1) the district may continue to rely on Open Records Letter No. 2004-2786 (2004) with regard to any information that is responsive to the present request and that is encompassed by the prior ruling; (2) the district may withhold the marked information that is confidential under Texas Rule of Evidence 503; and (3) the district must not release the names of students unless it has authorization under FERPA to do so. The rest of the submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

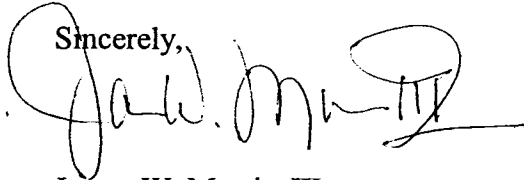
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris III", with a long horizontal flourish extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 217532

Enc: Submitted documents

c: Mr. Bob Comeaux  
Field Representative  
Texas Federation of Teachers  
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(w/o enclosures)